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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-422.

LAKE CARRIERS' ASSOCIATION, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

BRIEF ON BEHALF OF APPELLANTS.

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BRIEF ON BEHALF OF APPELLANTS.

OPINION BELOW.

The Memorandum Opinion of the United States District Court for the Eastern District of Michigan, Southern Division, is not reported, but is printed in the Jurisdictional Statement beginning at page 21.

JURISDICTION.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The judgment of the United States District Court for the Eastern District of Michigan, Southern Division was filed and entered on July 12, 1971. Notice of Appeal was filed on July 29, 1971 and Probable Jurisdiction was noted December 7, 1971.

STATUTES, LAWS AND TREATIES INVOLVED.

Michigan Watercraft Pollution Control Act of 1970 (Act 167 of 1970; C.L. '48 § 323.331; M.S.A. § 353 (201) et seq.); attached as Appendix G to Jurisdictional Statement. The Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. § 1151, et seq.; the Steamboat Inspection Acts of February 28, 1871 and May 27, 1936, 46 U.S.C. § 361, et seq.; the Boundary Waters Treaty of 1909 between the United States and Canada, 36 Stat. 2448, Treaty Series No. 548; and Article I § 8, cl. 3; Article III § 2, cl. 1; Article VI, cl. 2, Amendment XIV § 1 of the Constitution of the United States.

The Michigan Watercraft Pollution Control Act of 1970 as particularly pertinent here, provides:

> Sec. 1 (g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.
>
> Sec. 3 (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.
>
> Sec. 4 (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with one of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

QUESTIONS PRESENTED.

1. Did the Trial Court abuse its discretion in abstaining from deciding the issues raised by the pleadings and the evidence?

Query: Under what circumstances may the Federal Courts act when there is no prosecution pending in State Courts at the time the Federal proceeding is begun?

2. Did the Trial Court abuse its discretion in failing to permanently enjoin enforcement of the Michigan Watercraft Pollution Control Act of 1970 because said Act is constitutionally infirm?

Query: Under what circumstances can a State prescribe shipboard equipment on Federally licensed vessels?

STATEMENT OF THE CASE.

Appellants brought this action to determine the constitutional validity of the Michigan Watercraft Pollution Control Act of 1970 (Act 167, Public Acts of 1970, State of Michigan) as applied to Federally licensed vessels engaged in interstate and foreign commerce upon the waters of the Great Lakes. At the outset, appellants wish to make it abundantly clear to the Court that they are not challenging Michigan's law out of any desire to avoid responsibility for preserving the ecology. Such is the duty of every citizen. Rather, appellants' interests go beyond the waters of Michigan and extend to all of the Great Lakes states. Only through uniform standards applicable throughout the entire Great Lakes, including the waters of Canada, can the water quality of the lakes be preserved. That is the objective here.

Collectively, appellants, with the exception of Lake Carriers' Association, are the owners and/or operators of 187 Federally enrolled and licensed Great Lakes bulk cargo vessels (A. 33). Great Lakes vessels are distinct in construction and design. The deck crew is housed forward and the engine crew aft, with the entire center portion of the vessel being devoted to cargo. (Exhibit B is a profile drawing of a typical Great Lakes bulk cargo vessel.)

Appellants provide vessel transportation, some for their own account and some for the account of others, or both, throughout the entire Great Lakes-St. Lawrence Seaway System. They serve in interstate and foreign commerce all of the major ports in the States of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York and the Provinces of Ontario and Quebec, Canada (A. 33, 34). The flow charts (attached to appellants' Jurisdictional Statement), prepared by the Great Lakes Regional Statistical Office of the Corps of Engineers for

the year 1964 (the last year for which such charts are available), show by principal commodities the commerce of the Great Lakes and fully demonstrate the interstate nature of that commerce. The trade patterns shown are typical of those existing today, the only difference being that in 1964 the total Great Lakes bulk commodity movement involving the principal commodities, iron ore, coal, grain, stone and petroleum, was 202,830,576 net tons, whereas in 1970 that same movement was 223,404,329 net tons.

In all, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian registry having a combined tonnage of 1,576,165 gross tons (A. 33).

Great Lakes vessels have the capability of operating within the Great Lakes system as far east as Anticosti Island and lift from 12,000 to 25,000 tons of cargo (A. 38). Depending upon their trades, some vessels, while traversing Michigan waters, never touch at Michigan ports (A. 39). Other vessels, while trading into Michigan ports part of the time, may at other times engage in different trades such as between Toledo, Ohio and Buffalo, New York or Chicago, Illinois and Oak Creek, Wisconsin, where they not only do not touch at Michigan ports, but they do not even traverse Michigan waters (A. 53).

Crew size ranges from thirty to thirty-five men per vessel. Each man generates approximately 125 gallons of liquid wastes per day. This includes wash water, drainage from normal showers and vehicle water to handle sanitary facilities (A. 39, 40). Act 167 of the Public Acts of Michigan, 1970, provides that a vessel having a marine toilet may not use, or permit the use of, such toilet on the waters

of the State unless the toilet is equipped with one of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Act 167 of the Public Acts of Michigan, 1970, also provides that a person shall not discharge into or onto the waters of the State any other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health and welfare or to the enjoyment of the water for recreational purposes.

While the Michigan Water Resources Commission has expressed an intent to enforce the Act, at the present time, only with respect to sewage from toilets, it is evident that in light of the broad scope of the Michigan law, any prudent vessel owner installing holding tanks on a vessel would seek total containment of all discharges because of the uncertainty with respect to what constitutes a noxious or unwholesome discharge (A. 40). To contain all such wastes would require, considering the number of men involved, the amount of liquid wastes created, existing trade patterns, the length of the voyage and attendant delays, a holding tank of at least 20,000 gallons at either end of the vessel, or a total retention capacity of 40,000 gallons (A. 40).

It is not feasible to utilize the existing ballast tanks on the vessel for the holding of raw sewage because of the necessity under the vessel inspection laws for periodic

physical inspection, which requires personnel to actually enter and crawl through the vessel spaces in order to examine the integrity of the hull (A. 74). Further, the placing of raw sewage against the hull structure of a vessel could result in serious corrosion and sanitary problems (A. 74).

Were the vessel owners to install holding tanks, it would be necessary to have pump-out facilities at basically every port on the Great Lakes in order to carry on normal trade (A. 43). Not only are there no pump-out facilities for commercial vessels in states other than Michigan, there are no such pump-out facilities even in Michigan (A. 94). Because there are no pump-out facilities in Michigan or elsewhere at the present time, the only alternative for a vessel with holding tanks is to pump those tanks out in the middle of the lake (A. 106).

With the exception of Escanaba and St. Joseph-Benton Harbor, none of the port cities in Michigan provide secondary treatment of municipal sewage wastes (A. 135). Thus, were commercial vessels at the present time to install holding tanks and pump into municipal facilities, no better than primary treatment could be achieved.

Treatment devices suitable for shipboard installation on commercial vessels are available which produce the equivalent of secondary waste treatment (A. 45). Such facilities are already in use on some 27 Great Lakes vessels (Exhibit 4). Further, the use of such devices, commonly called "package plants," is prevalent on land for small communities, shopping districts, resort areas and isolated industries (A. 78).

The Michigan Water Resources Commission readily admits that there is nothing wrong or harmful in a commercial vessel discharging an effluent in the open lake which has received the equivalent of secondary waste

treatment (A. 137, 138). At the same time, the Commission reiterates that it would be unfortunate from the standpoint of pollution control if a commercial vessel were to pump out holding tanks containing raw sewage in waters of the Great Lakes other than Michigan waters, but that it could do so, because from the standpoint of Michigan itself, jurisdiction ends with Michigan waters (A. 138).

On the Great Lakes, the pollution problems are essentially along the shore. When you collect waste on board a ship in a holding tank and bring it ashore, it results in further concentration at a given point (A. 78). By limiting vessels totally to holding tanks and/or incineration, it means that until such time as treatment devices equivalent to the biogest process are provided on shore, instead of accelerating pollution abatement from vessels, pollution abatement is actually being delayed because wastes are being brought ashore to a point to provide for treatment that does not exist (A. 78). Vessels should be permitted to provide treatment on a continuing basis so that the waste water discharge is no longer sewage, but actually treated waste water which meets the standards and requirements of the uses designated for Michigan waters (A. 88). Properly operated shipboard waste treatment devices such as the biogest process do not render the waters noxious or unwholesome, but result in an acceptable water supply (A. 83).

This litigation is not concerned with the relative merits of the conflicting policies of regulation by the federal and state governments. As was observed by Justice Jackson in *Franklin National Bank v. New York*, 347 U.S. 373, 378:

> "There appears to be a clear conflict between the law of New York and the law of the Federal Govern-

ment. We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy."

ARGUMENT.

I.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN ABSTAINING FROM DECIDING THE ISSUES RAISED BY THE PLEADINGS AND THE EVIDENCE?

QUERY: UNDER WHAT CIRCUMSTANCES MAY THE FEDERAL COURTS ACT WHEN THERE IS NO PROSECUTION PENDING IN STATE COURTS AT THE TIME THE FEDERAL PROCEEDING IS BEGUN?

Point 1:

An actual controversy exists within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201, which is ripe for determination.

Appellants contend that the District Court erred in holding that with respect to issues other than preemption the lack of a judiciable controversy precluded entry of the court into the matter.

It is recognized that the Federal Courts will not grant declaratory relief in instances where the record does not disclose an actual controversy. As was said in *Maryland Casualty Company v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory

> Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

The District Court for some reason took the attitude that there is no case or controversy here because no prosecution is pending or threatened which would realistically infer that appellants in a trial of a case in State Court would be denied the benefits of the due process and equal protection clauses. That is not the test. Appellants do not claim bad faith on the part of Michigan officials, nor do they challenge the integrity of the Michigan courts. Appellants do contend, however, that the record in the present case establishes an actual controversy which should have been adjudicated by the lower court.

Appellants should not be required to continuously run the risk of criminal prosecutions in order to demonstrate the existence of an actual controversy. Appellants' vessels cannot enter Michigan waters without being subjected by statute to special disabilities, i.e., the installation of either holding tanks or incinerating devices, and all have a substantial, immediate and real interest in the validity of the statute which imposes that disability. *Evers v. Dwyer*, 358 U.S. 202.

Appellants are not here seeking an advisory opinion. They are confronted on the one hand, if state law is applicable, with the installation of holding tanks or incinerating devices. On the other hand, under Section 13 of the Water Quality Improvement Act of 1970, 33 U.S.C. § 1163,

flow-through treatment devices will be authorized and holding tanks or incinerating devices will not be required. Simply stated, the controversy is this: the Congress, in enacting the Water Quality Improvement Act of 1970, was as fully cognizant of the public interest in water pollution abatement as was the Michigan Legislature in enacting the Michigan Watercraft Pollution Control Act of 1970. The solution of Congress differs from that of the State of Michigan. Superimposed upon that issue are serious public questions as to the authority of the State to enact such legislation as concerns federally licensed vessels engaged in interstate and foreign commerce throughout the Great Lakes. Certainly it is in the paramount public interest to resolve these legal issues arising out of these conflicting solutions to the pollution problem and, as observed by this Court in *Dombrowski v. Pfister,* 380 U.S. 479, the solution of these issues cannot be satisfactorily achieved through a series of criminal prosecutions. Appellants contend that pollution abatement from federally licensed vessels is a federal matter and that Michigan has no legal right to require the installation of holding tanks or incinerating devices. No construction of the Michigan statute by a state court can avoid that issue. The conflict of interests is real and ripe for determination and the issues joined on the pleadings and the evidence should have been decided by the court below.

Point 2:

Supremacy clause cases are within the purview of a three judge court where there are also other substantial issues involving provisions of the Constitution.

Appellants contend that there are substantial issues of constitutional law here involved which bring the case within the purview of a three judge court.

The District Court's reliance on *Swift & Co. v. Wickham*, 382 U.S. 111, is misplaced. In that case, this Court found that appellant's commerce clause and fourteenth amendment claims were too insubstantial to support three judge court jurisdiction. Thus the issue was narrowed to the single question of whether an action grounded alone on the supremacy clause and involving as it does the comparison of two statutes rather than the interpretation of the Constitution, is within the purview of 28 U.S.C. § 2281. The court, page 125, noted two possible interpretations of 28 U.S.C. § 2281, the first that all suits to enjoin enforcement of a state statute, whatever the federal ground, must be channeled through three judge courts, and the second that no such suits resting *solely* on supremacy grounds fall within the statute. The decision was, page 128, that three judge courts are not required in supremacy clause cases involving *only* federal-state statutory conflicts. Thus, the instant case was properly brought before a three judge court because it involves substantial issues of constitutional law over and above the single issue of preemption.

Point 3:

The District Court abused its discretion in abstaining from deciding the merits of the challenge to the Michigan Watercraft Pollution Control Act of 1970.

Appellants contend that the issues joined on the pleadings and the evidence should have been decided by the District Court.

The abstention doctrine, first formulated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, has gone through considerable refinement in recent years and may now fairly be said to be applicable only to those cases where a statutory construction applied by a state court would eliminate the constitutional issue and terminate the litigation. Such is not this case. Here, no state court construction of the Michigan Watercraft Pollution Control Act of 1970 could avoid the federal issues raised on the pleadings and the evidence. Abstention is inappropriate where there are no substantial problems of statutory construction and delay would prejudice constitutional rights. *Shelton v. McKinley*, 174 F. Supp. 351 (D.C. E.D., Ark.).

United States v. Livingston, 179 F. Supp. 9, 12-13 (D.C. E.D., S.D.), aff'd *Livingston v. United States*, 364 U.S. 281, holds:

> "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it."

In *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (D.C. W.D., Tex.), aff'd 385 U.S. 355, it was observed that the doctrine of abstention is not an absolute rule to be applied to all cases involving the constitutionality of a state

statute. It was further observed that the defendant had taken no affirmative action to enforce the statute involved, but the very presence of the statute itself and the possibility of its enforcement were grounds enough for declaratory relief. Said the court, page 837:

> "If * * * the statute in question (§ 2201) were to be strictly construed so as to require an affirmative 'threat,' the purpose of Section 2201 of Title 28, United States Code, would be defeated."

The recent series of cases involving first amendment rights has a bearing here. *Dombrowski v. Pfister, supra,* holds abstention inappropriate where a statute is justifiably attacked on its face and that an injunction is appropriate where no readily apparent construction is available to bring the statute within constitutional confines in a single prosecution.

Even more directly in point is *Zwickler v. Koota,* 389 U.S. 241. Appellant was convicted of violating a New York penal statute for distributing anonymous handbills critical of the record of a United States congressman seeking reelection. Following state proceedings the appellant invoked the District Court's jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343 and the Declaratory Judgment Act, 28 U.S.C. § 2201, on the grounds that the state statute, on its face, was repugnant to the guarantees of free expression secured by the federal Constitution. The three judge district court applied the doctrine of abstention and dismissed the complaint, limiting the appellant to the New York courts to assert his constitutional challenge. This Court, after noting, page 244, that where abstention is proper, it is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction rather than to dismiss (a practice not followed in the instant

case), reversed, holding abstention improper. This Court pointed out that Congress imposed the duty upon the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. The doctrine of abstention sanctions such escape only in narrowly limited "special circumstances."

No construction by a state court of the Michigan statute could avoid the constitutional questions arising out of Michigan's demand that federally licensed vessels install holding tanks or incinerating devices. Abstention cannot be ordered simply to give state courts the first opportunity to vindicate a federal claim.

Younger v. Harris, 401 U.S. 37, and *Samuels v. Mackell,* 401 U.S. 66, are narrow in their holding, being limited to the propriety of declaratory or injunctive relief, while state criminal proceedings are pending. Michigan now argues that because there are no criminal prosecutions pending or threatened, injunctive relief and declaratory judgment procedures are not appropriate in the absence of a showing of bad faith. This argument overlooks the fact that prior to the opening of the navigation season in 1971, appellants sought and obtained a temporary restraining order from the District Court. Thus the state officials were precluded from instituting criminal prosecutions.

It should be clear, however, that there is no implication in this litigation that appellants are accusing state officials of bad faith or harassment. They are public spirited individuals attempting to carry out their duty as they see that duty under Michigan law. Thus, whether or not in first amendment cases bad faith enforcement must be shown to invoke federal jurisdiction (see Federal Juris-

diction and Procedure, 85 Harvard Law Review, No. 1, pages 301, 315) should not be the test here. Instead, in instances of this kind, the purpose of the Declaratory Judgment Act, as stated in *Edelmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 854, should be observed:

> "It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued."

Point 4:

This Court should now proceed to decide on the merits the issues raised by the pleadings and the evidence.

Appellants contend that, abstention being clearly improper, to now remand the case to the District Court for further proceedings will merely result in the same delay and prolonged uncertainty as abstention.

Baggett v. Bullitt, 377 U.S. 360, involved a class action brought by members of the faculty, staff and students of the University of Washington to test the constitutionality of state statutes requiring the taking of two oaths, one enacted in 1955 applicable to state employees, and one enacted in 1931 applicable to teachers. The District Court held that the 1955 oath and underlying statutory provisions did not infringe upon any first and fourteenth amendment freedoms and were not unduly vague. With respect to the 1931 oath, the court held that, although the challenge raised a substantial constitutional issue, adjudication was not proper in the absence of proceedings in the state court which might resolve or avoid the constitutional issue. The action was then dismissed.

In reversing, this Court held that the abstention doctrine is not an automatic rule applied whenever a federal

court is faced with a doubtful issue of state law. The "special circumstances" necessary to justify abstention were not found to be present because a construction of the oath provisions in light of the vagueness challenge would not avoid or fundamentally alter the constitutional issue raised. This Court further noted that remitting the litigants to the state courts for a construction of the 1931 oath would further protract the proceedings, with only the likelihood that years later the case would return to the three judge district court and perhaps to this Court for a decision on the identical issues. This Court then proceeded to declare the 1931 oath unconstitutionally vague.

Thus there is ample precedent for this Court to proceed to decide the merits of this case. All the evidence that was before the District Court is before this Court, and to remand to the District Court would only delay the ultimate disposition of the proceedings. It is respectfully requested that this Court proceed to dispose of, on the merits, the issues raised on the pleadings and the evidence.

II.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN FAILING TO PERMANENTLY ENJOIN ENFORCEMENT OF THE MICHIGAN WATERCRAFT POLLUTION CONTROL ACT OF 1970 BECAUSE SAID ACT IS CONSTITUTIONALLY INFIRM?

QUERY: UNDER WHAT CIRCUMSTANCES CAN A STATE PRESCRIBE SHIPBOARD EQUIPMENT ON FEDERALLY LICENSED VESSELS?

Point 1:

The Michigan Watercraft Pollution Control Act of 1970 conflicts with the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970 and impairs federal superintendence of the field.

Appellants contend that the state prescribed standards stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because state requirements with respect to standards of performance for marine pollution control devices nullify federal discretion over the subject matter and interfere or conflict with the provisions of the federal legislation.

As previously stated, conflicts between federal and state law are to be resolved as a matter of supremacy, not policy. *Easton v. Iowa,* 188 U.S. 220, 229-230; *Davis v. Elmira Savings Bank,* 161 U.S. 275, 283. In determining supremacy, the principles enunciated in *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, appear applicable here. While the Court held that the maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation, the Court did set forth the principles to be derived from its more recent decisions concerning federal regulation of commerce, namely, that

such federal regulation should be deemed preemptive of state regulatory power if either the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained. In this instance, we believe that both tests have been amply met.

Certainly elaborate and costly pollution control devices on vessels which must serve the needs of eight separate states and two separate provinces of Canada are not only a likely but a logical candidate for exclusive federal regulation. Further, in *Avocado Growers, supra*, the state and federal regulations applied to different subject matters, whereas here the state and federal acts seek to regulate precisely the same field, to wit, the use, type and design of shipboard waste treatment systems for disposal of shipboard sewage.

A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design when compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce. *Union Bridge Co. v. United States*, 204 U.S. 364; *Morgan v. Virginia*, 328 U.S. 373. Indeed, in this instance national uniformity would appear to be so essential that all state action is inadmissible even in the absence of federal legislation. *Southern Pacific Co. v. Arizona*, 325 U.S. 761; *Bibb v. Navajo Freight Lines*, 359 U.S. 520.

But the power of Congress to exercise exclusive control over the operations in interstate commerce, specifically involved here, are not in dispute because the State of Michigan has admitted that upon the effective date of the proposed federal standards, federal law will preempt the field. The question is whether federal superintendence of the field requires that state regulation must give way now.

The obvious pervasiveness of federal supervision of the entire field of marine sanitation devices by statute and regulation is a strong factor favoring a finding of preemption. The fact that the Congress has directed and not merely authorized a comprehensive program for establishing standards for marine sanitation devices is a strong indication of preemptive intent. *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148; *Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U.S. 767.

The fact that diverse state laws occasioning contradictory or overlapping regulations, vis a vis, federal regulations in the same field, frustrate the congressional purpose to achieve uniformity, and has been viewed by this Court as a factor favoring preemption.

Thus, in *Hill v. Florida,* 325 U.S. 538, a state statute regulating labor union activities was struck down because the statute was an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The same is true of the Michigan Watercraft Pollution Control Act of 1970. While it is true that the proposed new federal standards for marine sanitation devices will not become effective for two years after promulgation for new vessels, and five years after promulgation for existing vessels, the clear and manifest purpose and intent of Congress was to permit vessel operators to design and develop necessary pollution control devices and install them on their vessels prior to the effective date of the standards. The Congress never intended that during this short interim period the States should come forward with a proliferation of varying and different requirements which, in effect, hamper and impede vessel operators from complying with federal law and prevent accomplishment and execution of the federal program.

The fact is that the Michigan Watercraft Pollution Control Act of 1970 has already interfered with the operation of federal law in that vessel operators are precluded from going forward with any type of realistic program which will enable them to comply wtih federal law. It is abundantly clear that the Michigan Watercraft Pollution Control Act of 1970 and the federal Water Quality Improvement Act of 1970 cannot move freely within the orbits of their respective purposes without impinging upon one another. *Union Brokerage Co. v. Jensen*, 322 U.S. 202.

In this instance, the prohibition of state action is inferable from the scope and purpose of the federal legislation. It is clear that the federal provisions are so inconsistent with those of the state that the state statute cannot be enforced without jeopardizing federal superintendence of the field. *Cloverleaf Butter Co. v. Patterson, supra.* The adequacy or inadequacy of the federal law is not the issue here. Congress has the power to preempt a field of activity within its constitutional authority, and has done so.

The very nature of the subject matter, namely, marine sanitation devices on board federally licensed vessels, requires state legislation to yield to federal authority. Federal supervision and exclusive federal regulation are absolutely essential in order to achieve uniformity vital to national interests. This the Congress recognized in passing the Water Quality Improvement Act of 1970.

Point 2:

The Congress, in enacting the Water Quality Improvement Act of 1970, expressed a clear and manifest intent and purpose to occupy the field.

Appellants contend that the Water Quality Improvement Act of 1970 demonstrates an unambiguous congressional mandate to the effect that it was occupying the field to the exclusion of all state regulations with respect to marine sanitation devices.

When the Federal Water Pollution Control Act was first enacted, it provided in the first section thereof (33 U.S.C. § 1151) that nothing in the Act should be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters of such states. At the time of this pronouncement, however, the Act did not apply to vessels or to sanitary waste treatment devices on board vessels. The Water Quality Improvement Act of 1970, approved April 3, 1970, was enacted for the specific purpose of providing a federal program for vessels utilizing the navigable waters of the United States. It directs the promulgation of federal standards for the performance of marine sanitation devices to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States from new and existing vessels. It further directs the promulgation of regulations consistent with maritime safety and the marine and navigation laws and regulations governing the design, construction, installation and operation of any marine sanitation device on board such vessels (33 U.S.C. § 1163).

The fact that the initial standards are not to become effective for new vessels until two years after promulgation, and for existing vessels five years after promulgation, does not mean that the Congress did not intend to

occupy immediately the field to the exclusion of all state regulations. The report of the Committee on Public Works, United States Senate, accompanying S. 7, the companion bill of H.R. 4148, which ultimately became the Water Quality Improvement Act of 1970 (91st Congress, First Session, Report # 91-351), states on page 11 that this new law will assist in preventing at the earliest possible time permitted by existing and advancing technology, economics and other practical considerations the discharge into the navigable waters of the United States of raw or inadequately treated sewage from vessels.

The Senate Public Works Committee further recognized the problems imposed by the shortcomings of present technology and economic impact on commercial vessels and the complexity of marine watercraft. Specifically, on page 12, the Senate Public Works Committee notes that conflicting regulations and standards relative to marine sanitation devices present a hardship and impose potentially serious restrictions on interstate movement of commercial vessels. The Congress intended to bring into being an orderly program, and there can be no order, only chaos, if in the interim until such program becomes fully effective, the states are permitted to impose a variety of divergent and conflicting requirements.

The problem is primarily one of statutory construction. Where the United States exercises its power of legislation so as to conflict with a regulation of a state either specifically or by implication, state legislation becomes inoperative and the federal legislation exclusive in its application. *Cloverleaf Butter Co. v. Patterson, supra; Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437; *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612.

Many of the existing vessels of appellants will be in immediate compliance with the federal standards as soon as they are promulgated. Such compliance will be mean-

ingless, however, if the Michigan statute stands. The prescription of holding tanks and incinerating devices by Michigan nullifies all federal discretion. Certainly the Congress did not intend to adopt a useless Act. Neither did it intend for the Coast Guard to promulgate useless regulations and certify useless devices which cannot be utilized because of state law.

Should there be any doubt as to the expressed preemptive intent of Congress, the canons of construction stated by this Court strongly favor the conclusion that the disputed field of regulation has been preempted. *Bethlehem Steel Co. v. New York State Labor Relations Board, supra; LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board,* 336 U.S. 18; *Garner v. Teamsters Union,* 346 U.S. 485.

Further, the Water Quality Improvement Act of 1970 requires that the Congress itself approve the equipment which is to be installed on board vessels under the requirements of the Act. Before the effective date of any federal standards the Secretary of the Interior must report to Congress the results of such research, studies, experiments and demonstrations he has conducted (33 U.S.C. § 1155 (j)). This shows a clear and manifest intent of Congress to reserve unto itself control of the development and installation of marine sanitation devices. The Water Quality Improvement Act of 1970 is a comprehensive scheme for a uniform, orderly development of a pollution control program for vessels throughout the navigable waters of the United States. A time frame has been built into the Act to permit such orderly development and certainly it was not the intent of Congress for states, in the interim, to come forward with a proliferation of legislation, rules and regulations which completely nullifies that program.

Point 3:

The vessel inspection laws administered by the United States Coast Guard preclude state prescribed standards with respect to shipboard pollution control devices.

Appellants contend that applicable federal standards governing the structure and equipment of federally licensed vessels preclude state prescription of shipboard equipment.

In addition to the Water Quality Improvement Act of 1970 there must also be considered the Steamboat Inspection Acts of February 28, 1871 and May 27, 1936 (46 U.S.C. § 361, et seq.) in determining preemption. For many years the Congress has maintained an extensive and comprehensive set of inspection laws relating to the form, design, workmanship, age and use of vessels. Based upon these inspection laws, the vessels of appellants are actually licensed (46 U.S.C. § 263) and enrolled (46 U.S.C. § 258) by the National Government. The purpose of federal inspection statutes, of course, is to insure the seagoing safety of vessels and that the equipment may be safely employed in the service proposed. The installation of holding tanks or incinerating devices on board vessels involve such matters as vessel stability, hull integrate and health. The inspection laws extend to the design, construction and the material of every part of the vessel. But the duty of the Coast Guard is not merely to inspect. It also prescribes the rules and regulations by which fitness for service shall be determined. There can be no question but that the Michigan Watercraft Pollution Control Act of 1970 is squarely in conflict with these federal statutes.

In *Napier v. Atlantic Coast Line R. Co., supra,* state requirements concerning automatic firebox doors on locomotives and state requirements concerning cab curtains

during winter months were held to be invalid because the Boiler Inspection Act was intended to occupy the field. Said the Court, pages 612, 613:

> "The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field."

Under the Water Quality Improvement Act of 1970 and the vessel inspection laws, the Coast Guard is entitled to insist on different equipment than that prescribed by the Michigan statute. Because the standards set by the Coast Guard must prevail, state requirements are precluded. No state authority can change federal specifications, yet that, in effect, is what the State of Michigan here seeks to do. As was said in *Kelly v. Washington*, 302 U.S. 1, a state inspection system may touch matters which the federal laws and regulations leave untouched. State rules which change the federal standards for the structure and equipment of vessels meet a different fate. Said this Court, pages 14, 15:

> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which

may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on."

There can be no doubt but that the overlap between the scope of the vessel inspection laws and the Michigan Watercraft Pollution Control Act of 1970 is such that the federal inspection legislation has preempted local action. To hold otherwise would be to ignore the teachings of this Court that state action which is unduly burdensome on maritime actions or interstate commerce is prohibited. *Minnesota v. Barber*, 136 U.S. 313; *Morgan v. Virginia*, *supra*; *Bibb v. Navajo Freight Lines*, *supra*.

Readily distinguishable is the case of *Huron Cement Co. v. Detroit*, 362 U.S. 440. In that case the City of Detroit sought only to limit certain smoke emission from vessels—not to eliminate them entirely. Further, the footnote of the Court, page 442, clearly indicates that while the Detroit legislation contained provisions making it unlawful to operate any combustion equipment without a certificate, there was nothing in the record to indicate that at any time the City had attempted to enforce these provisions with respect to the actual equipment aboard the vessels.

Not so here. The Michigan Watercraft Pollution Control Act of 1970 specifically attempts to regulate and prescribe the type of pollution control equipment which must be installed upon federally licensed vessels before entering Michigan waters, even though, early in our history, this Court, in the landmark decision of *Gibbons v. Ogden*,

9 Wheat. 1, held that a state may not exclude from its waters a ship operating under a federal license. It is plain that even though waste treatment devices may have been inspected and approved by the Coast Guard, the Michigan Act attempts to prescribe different equipment, namely, holding tanks or incinerating devices.

Under the Michigan Act, the biogest system, with which many vessels are equipped, and which produces an overboard effluent equal to secondary municipal waste treatment, is not permitted, despite the fact that it had been approved by the Coast Guard for shipboard installation. In other words, such equipment, approved and licensed by the Federal Government for use on navigable waters, cannot pass muster under local Michigan law. As was said in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, page 566, no state law can hinder or obstruct the free use of a license granted under an Act of Congress. As already indicated, the requirements of Michigan may be too lax for another state such as Wisconsin. The variety of requirements for equipment which the states may provide, in order to meet what they alone consider their water pollution needs, underlies the importance of federal regulations serving as authority for vessels to use in all of our ports the equipment which, under federal regulations, is certified.

Point 4:

The Michigan Watercraft Pollution Control Act of 1970 materially affects interstate and foreign commerce in matters where uniformity is necessary and relates to a subject demanding exclusive federal regulation.

Appellants contend that the subject matter of the Michigan Watercraft Pollution Control Act of 1970 demands material uniformity of federal regulation and that state action is altogether inadmissible even in the absence of federal action.

It is a canon principle of constitutional law that a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Hull v. De Cuir,* 95 U.S. 485; *Southern Pacific Co. v. Arizona, supra; Bibb v. Navajo Freight Lines, supra.* While the scheme of federal regulation here appears so persuasive as to make reasonable the inference that Congress left no room for the state to supplement, the appellants contend that even in the absence of federal regulation, the federal interest is so dominant and the need for uniformity so significant that the states may not act.

We are here dealing with specific equipment on vessels which must serve the commercial needs of some eight separate states and two provinces of Canada. If the matter of pollution control devices is left to the whim of each individual state, only chaos can result. The impermissible burden on interstate commerce is readily apparent. The State of Michigan has invaded the exclusive jurisdiction of interstate commerce which the Constitution, by agreement among the several states, has specifically reserved to the Federal Government. The Michigan Watercraft Pollution Control Act of 1970 discriminates against interstate commerce, operates to disrupt its required uniformity, and may not constitutionally stand.

Point 5:

The Michigan Watercraft Pollution Control Act of 1970 contravenes the essential purposes of and works material injury to characteristic features of the maritime law and interferes with its proper harmony and uniformity.

Appellants contend that the installation and operation of sanitation devices on commercial vessels is maritime in nature, is national in character, and admits and requires uniformity of regulation consistent with uniform maritime law.

Apart from Article I, Section 8, Clause 3 of the Constitution relating to interstate and foreign commerce, the Constitution denies to the states all power by legislation to contravene the essential purposes of or to work material injury to the characteristic features of the maritime law or to interfere with its proper harmony and uniformity.

Article III, Section 2 of the Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction"; and Article I, Section 8 confers upon the Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States or in any department or offices thereof." It is settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527.

Indeed, the Constitution itself has occupied the field by taking from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of maritime law or to interfere with its proper harmony and uni-

formity. *The Lottawanna,* 21 Wall. 558; *Workman v. New York City,* 179 U.S. 552; *The Moses Taylor,* 4 Wall. 411; *Steamboat Co. v. Chase,* 16 Wall. 522; *The Roanoke,* 189 U.S. 185.

In *The Lottawanna, supra,* it was said, page 575:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

In *Southern Pacific Co. v. Jensen,* 244 U.S. 205, this Court held that New York could not apply its Workmen's Compensation Act to stevedores injured in New York while unloading a vessel engaged in coastwise traffic. If the several states could subject ships to the obligations of their compensation statutes, said this Court, page 217:

> "The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

If the mere unloading of a vessel is immune from state regulation, then certainly the actual equipment aboard a vessel, such as sanitation devices, is likewise immune.

Following the *Jensen* decision, Congress enacted a statute to permit the several states to apply their compensation laws to maritime injuries. In *Knickerbocker*

Ice Co. v. Stewart, 253 U.S. 149, the statute was held to be beyond the power of Congress. Said this Court, page 164:

> "The definite object of the grant (of power of Congress to legislate on rights and liabilities within maritime jurisdiction) was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."

This Court noted a distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce. Said this Court, page 166:

> "Here we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the States. Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

Conflicting state regulations and standards relative to pollution control devices present a potentially serious restriction on the interstate movement of commercial vessels—the very situation that the Constitution seeks to avoid by placing exclusive jurisdiction to legislate with respect to maritime matters in the Federal Government. There can be no doubt that sanitation devices installed aboard federally licensed commercial vessels are maritime in nature and deserving of uniform treatment in the interest of securing the harmony of the maritime law.

Point 6:

The Michigan Watercraft Pollution Control Act of 1970 constitutes the taking of appellants' property without due process of law in violation of Section I of the 14th Amendment of the Constitution of the United States.

Appellants contend that the Michigan Act seeks to compel them to install equipment and devices which will or may become wholly obsolete or otherwise worthless upon the promulgation of federal standards and which devices are of no immediate benefit to anyone because there are as yet no waste discharge facilities available for commercial vessels in any of the ports of Michigan or the ports of any other states. Further, appellants are without an adequate remedy in law because vessels transiting Michigan waters and not touching at Michigan ports have no legal means of compelling the installation of pump-out facilities in any other state.

It is recognized that the authority of the States to make regulations affecting commerce is absolute, except insofar as that power has been restricted by the Constitution of the United States. *License Cases*, 5 How. 504, 583. The Fourteenth Amendment, as respects state action, does not prohibit governmental regulation for the public welfare, but it does condition the exercise of that power by requiring that the end shall be accomplished by methods consistent with due process, and, as has often been held, the guarantee of due process demands that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained. *Nebbia v. New York*, 291 U.S. 502, 524.

In inquiring into the reasonableness of an Act, the Court must evaluate the relative weights of the beneficial

consequences which would follow from upholding the statute and the price which must be paid for them in the form of the resulting deprivation of rights or property. See *The Consideration of Facts in Due Process Cases*, 30 Columbia Law Review 360, 362.

Liggett Co. v. Baldridge, 278 U.S. 105, holds that the legislation must be reasonably calculated to attain the desired objective. See also *Burns Baking Co. v. Bryan*, 264 U.S. 504; *Smith v. Texas*, 233 U.S. 630.

If alternate methods are available for attaining a desired end, the fact that one entails a greater deprivation than the other is a factor for consideration on the validity of the legislative choice. *Weaver v. Palmer Bros. Co.*, 270 U.S. 402. Involved in the *Weaver* case was a statute of Pennsylvania which prohibited the use of shoddy in the manufacture of comfortables. Evidence was introduced to the effect that the manufacturer used effective steam sterilizers and that shoddy may be rendered harmless by disinfection and sterilization. The Court held that as against this fact the provision in question could not be sustained as a measure to protect health and that the absolute prohibition of the use of shoddy was purely arbitrary and violated the due process clause of the Fourteenth Amendment.

In the instant case, Michigan seeks to compel appellants to install pollution control devices which, upon the promulgation of federal standards, will or may become wholly obsolete or otherwise worthless. Moreover, there are no pump-out facilities in Michigan suitable for commercial vessels, and therefore any holding tanks installed upon appellants' vessels would have to be discharged overboard anyway so that the objective which the Michigan statute seeks to achieve cannot be accomplished.

Even were pump-out facilities available, the objective of the Michigan Act would still be thwarted because Michigan municipalities and shore cities are not yet providing secondary waste treatment; indeed, most municipalities are way behind schedule and at present provide only primary treatment.

Accordingly, the beneficial consequences that would follow from upholding the Michigan statute are nil and yet the price that the appellants must pay is severe. Alternate methods are available for obtaining the desired end; namely, the installation of shipboard waste treatment systems equal to secondary waste treatment which appellants anticipate will be permitted under the federal standards.

In considering the validity of the legislative position, it becomes abundantly clear that the Michigan Watercraft Pollution Control Act of 1970 is unreasonable, arbitrary, and capricious in that the means selected have no real or substantial relationship to the objectives sought to be attained, particularly in view of the alternate methods which are available for attaining the desired end.

Point 7:

The Michigan Watercraft Pollution Control Act of 1970 denies to appellants the equal protection of the laws in violation of Section I of the Fourteenth Amendment of the Constitution of the United States in that such Act makes it unlawful for commercial vessels to discharge overboard any sewage whether treated or not while at the same time no Michigan law prohibits shore-based industry and municipalities from discharging inadequately treated sewage into the waters of the Great Lakes.

Appellants contend that requiring commercial vessels to discharge waste ashore into municipal waste treatment systems when the principal ports of Michigan have not yet met the standards for secondary treatment imposed upon them by the Michigan Water Resources Commission is a denial of the equal protection of laws, particularly when there is no evidence that by requiring commercial vessels to discharge wastes ashore there is any better treatment of sewage than the vessels can provide themselves given adequate time in which to comply with anticipated federal standards for the performance of marine sanitation devices.

The purpose of the equal protection clause of the Constitution is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37. A corporation is as much entitled to the equal protection of the laws as an individual. *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394; *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389; *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150. Any classification made under a state statute must rest upon some ground of difference having a fair and substan-

tial relationship to the objective of the legislation so that all persons similarly circumstanced shall be treated alike. *Schlesinger v. Wisconsin*, 270 U.S. 230, 240. Mere difference is not enough. The attempted classification must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. *Gulf, Colorado & Santa Fe Ry., supra; Louisville Gas Co. v. Coleman, supra.*

The Michigan Watercraft Pollution Control Act of 1970 seeks to prohibit completely and entirely the overboard discharge of wastes from appellants' vessels while at the same time no Michigan law prohibits municipalities or shore based industry from discharging into the Great Lakes. The State obtains no benefit since the shore cities of Michigan do not yet have secondary waste treatment to an extent sufficient to receive wastes from all commercial vessels. There is no evidence that the discharge of waste from a vessel, given secondary treatment, is any more harmful than similar discharges from municipalities or industry. The Michigan Watercraft Pollution Control Act of 1970 does not rest upon any reasonable basis, is essentially arbitrary, and denies to appellants the equal protection of the laws.

Point 8:

The Michigan Watercraft Pollution Control Act of 1970 violates constitutional requirements of due process and equal protection of the laws in that the Act is so vague and ambiguous that it does not specify with sufficient certainty the conduct which it intends to proscribe and punish.

Appellants contend that the Act is so vague and uncertain that men of ordinary intelligence must guess at its meaning and differ as to its application with respect to (1) what discharges render the waters unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health and welfare, or to the enjoyment of the waters for recreational purposes; and (2) the degree of flexibility of the provision or the rule which will permit a watercraft owner, in carrying out the provisions of the rule, to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

It is fundamental law that penal statutes must proscribe with appropriate certainty and definiteness the crimes they seek to punish and the test applied in determining compliance with this requirement is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Pierce v. United States,* 314 U.S. 306. The standards of certainty in penal statutes are higher than those depending primarily on civil sanction for their enforcement. *Winters v. New York,* 333 U.S. 507. There are no constructive criminal offenses and statutory offenses cannot be established by implication. A penal statute should not be admitted of such a double

meaning that a citizen can act on one conception of its requirements and the courts on another. A penal statute must be sufficiently explicit to inform those subject to it what acts it is their duty to avoid or what conduct on their part will render them liable to those penalties.

The Michigan Watercraft Pollution Control Act of 1970 fails to meet the above test. Paragraph (1) of Section 3 of the Act seeks to prohibit discharges into or onto the waters of the State of all liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or interfere with the enjoyment of the waters for recreational purposes.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged, Merriam-Webster, 1966, states that the word noxious is derived from the Latin words *noxius* and *noxa*, meaning damage, offense, harm, and is akin to the Latin word *nocere*, meaning to harm, *nec-, nex* violent death, Greek *nekros* dead body.

A fifth of whiskey consumed in a hour can be fatal, whereas, a fifth of whiskey consumed over a period of weeks or months may be medicinally beneficial. By similar token, what degree of deposit of liquid or solid materials, i.e., sewage, into the waters of the State renders the waters noxious or unwholesome? When does such a discharge become detrimental to the public health or welfare or interfere with the enjoyment of the waters for recreational purposes? What is the standard? Certainly men of reasonable intelligence may well differ.

Further, Paragraph (2) and Paragraph (1) of Section 3 are patently inconsistent. Paragraph (2) appears to prohibit the discharge of any sewage from a watercraft, whereas, Paragraph (1) would appear to permit such a

discharge provided the waters are not rendered unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or interfere with the enjoyment of the waters for recreational purposes. The two provisions cannot be enforced simultaneously, nor can they be reconciled.

Even more vague and ambiguous is Section 11 of the Act. That section provides that any person who violates the Act is guilty of a misdemeanor and subject to a fine of not more than $500. To be enforceable, however, Section 11 adds:

> "the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

What is meant by the provision and what is meant by the rule? If it is means to be any provision of the Act, then how flexible is each provision to be enforceable?

Finally, the federal marine and navigation laws and regulations would seem to include the Water Quality Improvement Act of 1970. Is the Michigan Act intended to be so flexible that a vessel in compliance with the Federal Act is automatically in compliance with the Michigan Act? These are questions that ordinary citizens of reasonable intelligence cannot answer with certainty. It logically follows that constitutionally the Michigan Act must fail because of the uncertainty and ambiguity as to its requirements.

CONCLUSION.

Appellants contend that the Michigan Watercraft Pollution Control Act of 1970 is unconstitutional, null and void because it interferes with federal superintendence of the field, it is contrary to the manifest intent and purpose of Congress, relates to a subject affecting interstate commerce in matters where uniformity is essential, interferes with the uniform maritime Law, violates constitutional requirements of due process and equal protection of the laws, and is so vague and ambiguous in its terms as to be constitutionally unenforceable.

Respectfully submitted,

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